CONMAL SDN. BHD. & ANOR.

v.

ROMAR REALTY (M) SDN. BHD. & ORS.

HIGH COURT MALAYA, KUALA LUMPUR
SITI NORMA YAAKOB J
[CIVIL SUIT NO. F 436 OF 1985]
30 JULY 1987

CIVIL PROCEDURE: *Summary judgment - Order 14 RHC application dismissed by Senior Assistant Registrar - Appeal to the Judge - Defendants object to affidavit of plaintiffs' solicitor - Question of affirmation before Commissioner for Oaths - Disclosure of source of information - Whether objection was as to form or substance - Question of merits of O.14 application and not to form - Whether issues raised by defendants triable issues.*

This was an appeal by the plaintiffs against the order of the Senior Assistant Registrar who on 4 September 1986 dismissed the plaintiffs' application for summary judgment under O. 14 of the Rules of the High Court 1980 against the 3rd, 4th and 5th defendants.

The main objection taken by the 3rd and 5th defendants was that the affidavit in support of the O. 14 application which was deposed by Mr. V.P. Pradhan, Counsel for the plaintiffs, is defective as it was not affirmed before the commissioner for oaths and that he has not disclosed the sources of his information. However, following a request by the 3rd defendant that the plaintiffs file an affidavit through their authorised official such an affidavit affirmed by a representative of the 2nd plaintiff was filed.

Held:

[1] In this case Mr. Pradhan's affidavit which was filed in Court was affirmed before the commissioner for oaths. As for the sources of information, Mr. Pradhan has clearly in his affidavit stated that all such information came from the plaintiffs.

[2] The objection taken by the 3rd and 5th defendants was only as to form and not as to substance. The second affidavit affirmed by the plaintiff's representative and filed was done specially at the 3rd defendant's request and the 3rd defendant cannot say that it was not a supplementary affidavit in reference to the plaintiff's application. In an application of this nature, the Court was more concerned with the merits of such application than the form.

[3] Since all the issues raised by the 3rd, 4th and 5th defendants were not triable issues, the Court allowed the plaintiffs' appeal with costs and ordered that judgment be entered for the plaintiff's against the 3rd, 4th and 5th defendants for all the prayers pleaded in the amended statement of claim.

[Plaintiff's appeal allowed with costs. Judgment entered against the 3rd, 4th and 5th defendants.]

Legislation referred to:
Companies Act 1965, s. 333(1A)
Rules of the High Court 1980, O. 14

For the plaintiffs/appellants - Vinayak P. Pradhan; M/s. Skrine & Co.
For the 3rd defendant/respondent - Amar Chand Vohrah; M/s. Vohrah Tan Chee Lan
For the 4th & 5th defendants/respondents - Manikam; M/s. Tay, Tee & Nasir

JUDGMENT

Siti Norma Yaakob J:

Two applications for summary judgment under O. 14 were issued by the plaintiffs against the 3rd and 5th defendants in one application and against the 4th defendant in the second application and both these applications were heard together and dismissed with costs by the Senior Assistant Registrar on 4 September 1986. The hearing before me was therefore an appeal by the plaintiffs to have the order of the Senior Assistant Registrar set aside and judgment entered against the 3rd, 4th and 5th defendants. Judgments in default of appearance have already been entered against both the 1st and 2nd defendants.

The 1st defendants in this suit are the registered owners of a piece of property in Kota Kinabalu on which construction of a building called "Romar plaza" has commenced. For this construction, the 1st defendants employed the first plaintiffs who are building contractors and to finance the initial part of the project which is estimated to cost an amount not exceeding RM21.7 million, a written agreement dated 2 December 1983 was entered into between the 1st defendants of the first part, the 1st plaintiffs of the second part and the 2nd to 5th defendants (the shareholders and directors of the 1st defendants) of the third part.

Under this agreement, the 1st plaintiffs agreed to arrange for a bank guarantee to be provided by the National Australia bank to one Asiavest Merchant bankers (M) Bhd. up to an amount of RM1.25 million (the guaranteed sum) as part security for the initial bridging finance of RM2.25 million to be granted by the said Asiavest Merchant Bankers (M) Bhd. to the 1st defendants. This bank guarantee is supported by "a back to back" guarantee given by the 2nd plaintiffs (a company incorporated in New South Wales, Australia) to the National Australia bank. Under Clause 3 of the agreement, the 1st defendants would repay the guaranteed sum together with all interests and bank charges to Asiavest Merchant Bankers (M) Bhd. by 15 March 1984. Under Clause 4, in the event there is default on the part of the first defendants to repay the guaranteed sum by 15 March 1984, the 2nd to 5th defendants would pay the guaranteed sum within 60 days of 15 March 1984. Under Clause 7 they also undertook to indemnify the 1st and 2nd plaintiffs with respect to all injuries, losses or damage suffered by either or both plaintiffs in consequence of any breach by the 1st defendants of any terms of the agreement. Under the agreement, the security for the loan from Asiavest Merchant Bankers (M) Bhd. was to be partly provided by the 1st defendants in the form of a charge of the same property on which "Romar Plaza" is being constructed and that this property will not be sold until the loan has been fully repaid.

By 29 September 1984, the 1st defendants in breach of the agreement, failed to pay the guaranteed sum which by then amounted to RM1,050,96.35 to Asiavest Merchant Bankers (M) Bhd. who in turn claimed on the bank guarantee against the National Australia bank. This prompted the National Australia bank to claim against the 2nd plaintiffs pursuant to the "back to back" guarantee and the 2nd plaintiffs has paid the sum of RM1,050,096.35 to the National Australia bank. Resulting from the breach of the 2nd to 5th defendants, the 2nd plaintiffs now claim indemnity from them for the sum they had paid to the National Australia bank and the continuing interest payable on such sum. In addition they also claim the same amount from the 1st defendants, the principal debtors under the contract of guarantee.

On 6 July 1985, in an attempt to settle the sum owing by them to the 2nd plaintiffs, the 1st defendants issued their cheque for RM1,050,096.35 which upon presentation for payment was dishonoured. On 24 July 1985, both the plaintiffs, through their solicitors, demanded payment of the said sum from all the defendants but when they failed to obtain payment, they filed this present suit on 21 August 1985, claiming the sum RM1,050,096.35, interests at the varying

rates charged by the National Australia bank and injunction restraining the 1st defendants from selling the property, that was provided as the security for thee loan until the sum claimed and the interests due have been paid.

The main objection taken by the 3rd and 5th defendants is that the affidavit in support of the application which has been deposed to by Mr. V.P. Pradhan, Counsel for the plaintiffs, is defective as it was not affirmed before the commissioner for oaths and that he has not disclosed the sources of his information.

The copy of Mr. Pradhan's affidavit dated 7 December 1985 and which is filed in Court, was affirmed before the commissioner for oaths and as for the sources of information, Mr. Pradhan has clearly stated in paras. 4, 6 to 10 and 12 and supported by the documentary evidence that all such information came from the plaintiffs. However, following a request by the 3rd defendant contained in para. 14 of his affidavit in reply dated 13 February 1986, that the application can be properly proceeded if the plaintiffs filed an affidavit through their authorised official, such an affidavit dated 10 March 1986, affirmed by representative of the 2nd plaintiffs in Melbourne, Australia, on behalf of both the plaintiffs, was filed before the hearing of the application before the Senior Assistant Registrar. As far as I can see, the objection is only as to form and not as to substance and 3rd and 5th defendants cannot now blow hot and cold by stating that the second affidavit cannot be referred to in the application as it is not supplementary affidavit. It must be remembered that it was filed specially at the request of the 3rd defendant and in an application of this nature, I am more concerned with the merits of such application than the form. For that matter, it is clear from the written agreement that the loan was arranged in Australia and it is only right and proper that the affidavit in support of the application should come from somebody with knowledge of all the facts. In this case, Mr. Pradhan, the Counsel for both the plaintiffs, having been briefed by them must be aware of all the facts, but if that is not enough, there is the second affidavit filed by a representative of the 2nd plaintiffs in Australia on behalf of both plaintiffs.

Coming now to the more important consideration as to whether there are triable issues raised by the 3rd, 4th and 5th defendants that merit dismissal of the appeal they have questioned

(1) the legality of the 2nd plaintiffs.

(2) the *locus standi* of the 2nd plaintiffs.

(3) the particulars of the land, and

(4) the security to be given for the loan.

The 3rd defendant has not questioned the legality of the 2nd plaintiffs in his affidavit in reply but in course of the hearing, his Counsel, Mr. Vohrah, has submitted that the question of the legality of the 2nd plaintiffs may well be an issue as the 2nd plaintiffs had failed to comply with s. 333(1A) of the Companies Act 1965. That section makes it mandatory for any foreign company, within 1 month of establishing a place of business within Malaysia, to lodge with the Registrar of companies, a notice in the prescribed form of the situation of their registered office in Malaysia. I do not consider that the business standing of the 2nd plaintiffs is in issue in this suit as para. 2 of the amended statement of claim has amply described them as a company incorporated in New South Wales, Australia with their registered office in New South Wales. From that statement, it is clear that they have not established any place of business in Malaysia and to that extent, s. 333(1A) is irrelevant. Since the 3rd defendant has gone one step further to allege that they have established a place of business in Malaysia, it is up to him now to prove it. Mere statement alone without more can never make an issue a triable one.

It is true that the 2nd plaintiffs had not signed the agreement but Clause 2 has mentioned their participation and Clause 7 specifically provides that the 3rd, 4th and 5th defendants shall indemnify the 2nd plaintiffs of any loss suffered by them in consequence of any breach by the 1st defendants of any of the terms of the agreement. It is not disputed that the 1st defendants had committed such a breach for failing to repay Asiavest Merchant Bankers (M) Bhd. on the due date and under Clause 7, the 2nd plaintiffs are entitled to claim against the 3rd, 4th and 5th defendants by way of their indemnity.

As to the 3rd defendants's objection that the plaintiffs should identify the property as described in para. 5 of the amended statement of claim as being the same property as that stated in recital C of the written agreement, I can only conclude that since the execution of the agreement on 2 December 1983, there had been a change in the reference to the property that prompted the plaintiffs to amend the statement of claim. If indeed the 3rd defendant had doubted that the property as particularized in the amended statement of claim is not the same property as that described in the agreement, he should at least give notice of this in his affidavit in reply that was filed after the amended statement of claim, in which case I feel sure that the plaintiffs would have produced the necessary evidence to confirm the change. In any event, as that objection was not raised in this affidavit but only raised in the course of submission, I can only conclude that this is yet another attempt by the 3rd defendant to establish a triable issue where none exists at all.

From the recitals of the written agreement, it is clear that the 3rd, 4th and 5th defendants requested for the loan to finance the initial construction of "Romar Plaza". From recital (C), it is also clear that a security for the loan, the 1st defendants would charge their property to Asiavest Merchant Bankers (M) Bhd. The 4th defendant has complained that no such charge has been created, no doubt if they had been one, he would not be held personally liable, as the loan would be foreclosed to meet the repayment of the loan. But whose obligation is it to have the land charged? Under recital (C), it is the 1st defendants that should do so and as a director of the 1st defendants, the 4th defendant should also be held responsible for this omission. In any event, by such omission, it is the 1st defendants who had breached the agreement and the 4th defendant cannot depend on the breach of somebody else's to dispute liability.

Both the 4th and 5th defendants have filed their statements of defence and although they have signed on the agreement, they have denied executing it. However, in their affidavits in reply to this application, they no longer dispute executing the agreement but they deposed that they were under the impression all along that liability upon default was strictly the liability of the 1st defendants, the principal debtors and that the plaintiffs would only pursue the matter against them as a last resort. By this admission, both 4th and 5th defendants were fully aware of their liabilities under the agreement when they indemnified both the plaintiffs in respect of any loss or injury suffered by the plaintiffs in consequence of the breach of the 1st defendants.

Since all the issues raised by the 3rd, 4th and 5th defendants are not triable issues, I had accordingly allowed the plaintiffs' appeal with costs and had entered judgment for the plaintiffs against the 3rd, 4th and 5th defendants for all the prayers pleaded in the amended statement of claim.

Also found at [1987] 2 CLJ 434